Supreme Court, U.S.
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No. 09-

IN THE
Supreme Court of the United States

CITY OF SAN CLEMENTE,

Petitioner,

v.

STEVE KLEIN; SUSEN FAY; M. LORRAINE KLEIN; MICHAEL LEWIS; SAUL LISAUSKAS; KRISTIN SCHUITEMAN; JEFFERSON SMITH; MARY THOMPSON; ELIZABETH WELLER; and ROBERT WELLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a City's interest in preventing litter and blight sufficient to justify a content-neutral "time, place and manner" restriction prohibiting throwing or depositing litter in or upon vehicles unless an occupant consents to receive it where ample alternative methods of communication admittedly remain open?

PARTIES

Plaintiff-appellants were Steve Klein, Susen Fay, M. Lorraine Klein, Michael Lewis, Saul Lisauskas, Kristin Schuiteman, Jefferson Smith, Mary Thompson, Elizabeth Weller and Robert Weller. Defendant-respondent-petitioner was the City of San Clemente.

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CITATIONS OF OPINIONS AND ORDERS

Klein v. City of San Clemente, Case No. CV-07-03747-AHM (C.D.Ca 2007)

Klein v. City of San Clemente, Case No. 08-55015, 584 F.3d 1196 (9th Cir. 2009).

JURISDICTION

The Court of Appeals for the Ninth Circuit issued its decision on October 2, 2009. No motion for rehearing was filed. The Court has jurisdiction under 28 U.S.C. § 1254(1) in that petitioner seeks review of this civil case from the Ninth Circuit Court of Appeals after its decision.

CONSTITUTIONAL PROVISIONS AND ORDINANCES

> "Congress shall make no law . . . abridging the freedom of speech."

U.S. Const. amend. I.

> "No person shall throw or deposit any commercial or non-commercial advertisement in or upon any vehicle. Provided, however, that it shall not be unlawful in any public place for a person to hand out or distribute, without charge to the receiver thereof, a non-commercial advertisement to any occupant of a vehicle who is willing to accept it."

San Clemente Municipal Code § 8.40.130.

San Clemente Municipal Code Chapter 8.40 Litter (set forth in its entirety in appendix).

STATEMENT OF THE CASE

The City of San Clemente passed a comprehensive Anti-Litter Ordinance. The Ordinance addressed matters such as trash in the streets, litter thrown from vehicles, litter dropped from aircraft, litter in parks, *etc.* One subsection of the ordinance prohibited persons from placing commercial or non-commercial advertisements in or upon vehicles. That subsection included an exception that allowed a person to hand matter to any occupant of a vehicle willing to accept it.

In June or 2007, Steve Klein and other plaintiffs (collectively, "Klein") distributed leaflets in the City. Klein initially handed leaflets to pedestrians but then began placing leaflets under the wipers of unoccupied vehicles parked on City streets. When instructed to cease by law enforcement officials, Klein stopped.

Klein sued, claiming that the Anti-Litter Ordinance violated his rights under the First Amendment. Klein sought a preliminary injunction, which the district court denied, finding that the City would likely prevail in showing that the ordinance was narrowly tailored to serve the City's significant interest in litter prevention and promoting aesthetic values. On appeal, the Ninth Circuit reversed, holding that on the record before it, the City's interests were not "sufficiently weighty" to justify the restrictions. Jurisdiction arose under 28 U.S.C. § 1331, with appellate jurisdiction below arising under 28 U.S.C. § 1292(a)(1).

The parties and both courts below agreed that the Ordinance was a content-neutral time, place and manner

restriction. Thus the issues were whether the restriction was "narrowly tailored to serve a significant government interest," and whether the restriction left open "ample alternative avenues for communication of the information" under *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

At the district court, counsel for Klein conceded "there are lots of alternatives available to get the message out that are linked to people's usage of cars." Those methods included offering leaflets to drivers of vehicles at the exits or entrances of parking lots. Leafleters could approach cars at stoplights (from driver's or passenger's side), and of course, person-to-person leafleting was an option as well.

Therefore, the only real issue was whether or not the Anti-litter Ordinance met the "narrowly tailored" aspect of the test. The Ninth Circuit, contrary to a prior holding from the Sixth Circuit on similar facts, found that it did not and reversed the district court's denial of a preliminary injunction.

REASONS FOR GRANTING THE PETITION

This case presents a constitutional question of "the most serious magnitude" in that it addresses the balancing required between free-speech rights under the first amendment and the interest a governmental entity may have in regulating certain types of conduct. *See, e.g., Watchtower Bible & Tract Society v. Village, Stratton*, 536 U.S. 150, 161 (2002). This Court must determine that balance, particularly in cases involving the rights of unwilling listeners. *See Hill v. Colorado*,

530 U.S. 703, 714-15 (2000). The activity in question is not that of traditional leafleting whereby a "speaker" distributes material to a passer-by who is willing to receive it, and the restriction against placing litter on unoccupied vehicles has not been addressed by this Court even though many governmental entities have similar prohibitions. *See Jobe v. City of Catlettsburg*, 409 F.3d 261, 274-79 (6th Cir. 2005) (appendix listing state, territorial and municipal prohibitions on placing litter on vehicles).

The Anti-Litter Ordinance is a traditional "time, place and manner" restriction on speech. Cities may impose reasonable time, place and manner restrictions on leafleting. *See Frisby v. Shultz*, 487 U.S. 474, 488 (1988) (upholding ban on leafleting in front of targeted residence); *Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 654-55 (1981) (upholding regulation restricting leafleting at state fair to assigned booths); *Hill v Colorado*, 530 U.S. 703, 723 (2000) (upholding regulation prohibiting leafleters within certain distance of health-care facility from approaching too closely a person without first receiving that person's consent).

A reasonable time, place and manner restriction must be (1) content neutral; (2) serve a significant government interest; (3) be narrowly tailored to serve that interest; and (4) permit sufficient alternative channels of communication. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984). All parties agreed that the Anti-Litter Ordinance was content-neutral, thus meeting the first prong.

The City advanced two significant interests: its governmental interest in prohibiting litter and visual blight and thus preserving the aesthetics of the community, and individuals' interests in having their private property left alone by those who do not have permission to use it.[1] Curbing litter and visual blight, thereby preserving the aesthetics of the community, are substantial governmental goals. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (four-justice plurality). In *Metromedia*, the plurality found that the appearance of the city and preserving scenic beauty were both "substantial" governmental goals. *Id.* at 552 and 570. *See also Horina v. City of Granite City*, 538 F.3d 624, 633 (7th Cir. 2008) ("we have no quarrel with [city's] claim that prevention of litter, intrusion, trespass and harassment is a substantial government interest").

The City's interest in curbing litter is evidenced by the very title of the ordinance. The City defined "litter" to mean garbage, refuse, rubbish . . . and all other waste materials which, if thrown or deposited as herein proscribed, tends to create a danger to public health, safety and welfare." Other sections of the Anti-Litter Ordinance deal with such matters as placing trash into public streets, throwing litter into public places, throwing litter from vehicles, *etc.* The Ninth Circuit, however, declined to accept the nexus between leaflets placed on vehicles and litter on the streets. *See Klein*, 584 F.3d at 1202

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[1] The Ninth Circuit determined this second ground under the California Constitution, so that issue is not presented for review.

The Sixth Circuit addressed a factually similar situation but reached the opposite result in *Jobe v. City of Catlettsburg*, 409 F.3d 261, 262 (2005). The *Jobe* Court noted that at least one state and many cities have ordinances prohibiting exactly the same conduct – depositing leaflets onto or into unoccupied vehicles without consent – as is at issue here. The *Jobe* Court specifically recognized that it would be a "daunting task" for a defendant to show the original purpose for an anti-litter ordinance, or to demonstrate the "empirical necessity for a law" on the facts before it. *See id.* at 269. Instead, the Sixth Circuit saw no reason to question the defendant's theory that a ban on placing leaflets on automobiles would further the City's interest in preventing littering.

The *Jobe* Court found that the ordinance advanced the governmental interest in preventing litter in a "narrow and constitutionally permissible way." *Id.* at 269. The court noted that the "substantive evil" of litter was "created by the medium of expression itself" so that the ordinance curtailed no more speech than necessary to accomplish its purpose." *Id.* at 269, quoting *Taxpayers for Vincent*, 466 U.S. at 810. Where the city had targeted the "precise problems" of littering and use of private property, the ordinance was constitutional. *Id.*

Two other circuits have addressed somewhat similar fact patterns: *Horina v City of Granite City*, 538 F.3d 624 (7th Cir. 2008), and *Krantz v City of Fort Smith*, 160 F.3d 1214 (8th Cir. 1998). In *Krantz*, the plaintiffs challenged city ordinances making it a misdemeanor to place handbills or advertisements on another person's

vehicle parked on public property unless an occupant were willing to accept it. The Eighth Circuit addressed the ordinances as time, place and manner restrictions but held as a matter of law that they were not narrowly tailored to serve a significant governmental interest where individuals not wanting to receive handbills "can quite easily and effectively provide notice . . . by placing a sign on the dashboard." *Id.* at 1220. The *Krantz* Court further found that the defendants had not established a factual basis to show a causal relationship between placement of leaflets on parked cars and litter. *See id.* at 1222. This holding directly contradicts with the Sixth Circuit's holding in *Jobe*:

> In view of the common-sense explanations for these type of laws, they do not invariably require proof that the problem has occurred in the past . . . or an elaborate study of their present-day necessity . . . . [I]t hardly amounts to speculation to conclude that the First Amendment costs of this law are quite modest (given the inexpensive alternatives available for distributing literature or advertisements) and the police-power benefits of the law are quite legitimate (given the private-property and aesthetic interests advanced by the law.

Jobe, 409 F.3d at 269.

The Seventh Circuit's decision in *Horina* involved slightly different facts that directly undercut the reasoning in *Krantz* that vehicle owners can protect themselves from unsolicited litter by advising leafleters not to place materials in or on their vehicles.

See Horina, 538 F.3d at 627. In that case, the plaintiff was leafleting cars parked on city streets adjacent to a medical clinic. One of the security guards directly instructed the plaintiff not to place tracts on his car to no avail. After watching Horina deposit yet another tract through an open window of his car, the guard contacted the local police department, which arrested the plaintiff. *See id.* at 627-28. Granite City enacted a revised regulation restricting leafleting that prohibited depositing or throwing handbills onto or into any vehicle. During the ensuing litigation over the revised regulation, the city did not offer any empirical studies, testimony, police records or reported injuries to support its claimed interests. The Seventh Circuit, however refused to accept Granite City's "assertion that it can rely on mere common sense to show that [the ordinance] is needed to combat those ills," including specifically preventing litter. *See id.* at 633.

This holding directly contradicts the *Jobe* Court's conclusion that the "common-sense explanations" for anti-littering ordinances meant that they "do not invariably require proof" of past or present problems. *Jobe*, 409 F.3d at 269. In fact, the dissent in *Horina* acknowledged that *Jobe* was directly on point and "found common sense enough" in its holding. *Horina*, 538 F.3d at 640 (Manion, J., dissenting). Noting that "common sense must not be and should not be suspended" in evaluating constitutionality, the dissent stated:

> Common sense dictates that the Ordinance serves the interests noted. It would be the rare driver indeed who has not experienced the intrusion of a flyer placed under a car

> windshield and the annoyance of removing the flyer, especially in inclement weather or when the driver doesn't notice it tucked under the passenger side windshield wiper until after fastening his seatbelt and starting his car. While the more thoughtful drivers dispose of such flyers properly, common sense tells us that at least some of the unwanted flyers become litter, even without evidence.

Horina, 538 F.3d at 640. Since the ordinance "regulate[d] precisely the conduct that causes the litter . . . namely the placing of flyers on automobiles," the dissent would have upheld the ordinance as narrowly tailored and constitutionally permissible. *See id.*

Of course, a time, place and manner restriction must leave open ample alternative methods of communication. The Ninth Circuit held that the existence of "numerous and obvious less-burdensome alternatives" was relevant to assessing whether a restriction reasonably fits the interest asserted. *See Klein*, 584 F.3d at 1201. However, the court did not address the admission by Klein that there were "lots of alternatives available" to get his message out, even "linked to people's usage of cars." The court below also did not address the options of handing out leaflets to vehicle occupants at stop lights or entrances/exits to parking lots, or simply resorting to traditional leafleting by handing material to passers-by on the street, which Klein had engaged in that same day.

Of course, the Court upheld a restriction that "unquestionably lessened" the ability to distribute leaflets in *Hill v. Colorado*, 530 U.S. 703, 715 (2000).

The restriction at issue there prohibited demonstrators from approaching too closely persons within a certain radius of the entrance to a health clinic. While acknowledging that the regulation made it more difficult to give leaflets to persons entering or leaving the clinic, the Court specifically noted the distinction between restrictions on willing audiences wishing to receive communications and the protection from unwanted communications being given to listeners. Since the distributors could stand near the path to the entrance and proffer their materials to any pedestrian willing to take them, the regulation left open an adequate means of speech. The Court noted that, "as in all leafleting situations, pedestrians continue to be free to decline the tender." *Id.* at 727. The regulation at issue protected the interests of those who did not wish to receive the materials while still allowing the distributors an ample alternative of communicating with those willing to listen.

The *Jobe* Court directly addressed this issue of alternative means, noting that this Court has been "quite sensitive to the need to permit inexpensive methods of spreading ideas and information." *Jobe*, 409 F.3d at 272. However, "the fact that a means of communication is efficient and inexpensive does not automatically trump other government interests." *Id.* The *Jobe* Court relied on this Court's explanation in *Taxpayers for Vincent* that:

> A distributor of leaflets has no right simply to scatter his pamphlets in the air – or to toss large quantities of paper from the window of a tall building or a low flying airplane. Characterizing such an activity as a separate

> means of communication does not diminish the State's power to condemn it as a public nuisance.

Taxpayers for Vincent, 466 US at 809, *quoted in Jobe*, 409 F.3d at 273.

The Seventh Circuit also addressed this requirement in *Horina*. While noting that adequate alternatives do not have to be the speaker's first or best choice, or provide for the same audience or impact, it noted that the alternative must be realistic. *See Horina*, 538 F.3d at 635. The court then concluded that neither person-to-person distribution nor mailing were adequate alternatives. However, there was no mention of any admission that "lots of alternatives," including those centered on vehicles, were available to Klein.

Thus there is a direct conflict between the Sixth Circuit's decision in *Jobe v. City of Catlettsburg*, 409 F.3d 261 (6th Cir. 2005), and the Seventh, Eighth and Ninth Circuits' decisions in, respectively, *Horina v. City of Granite City*, 538 F.3d 624 (7th Cir. 2008), *Krantz v. City of Fort Smith*, 160 F.3d 1214 (8th Cir. 1998), and *Klein v. City of San Clemente*, 584 F.3d 1196 (9th Cir. 2009). This conflict arises on the critically important matter of the proper balance between free-speech rights under the first amendment and the government's ability to regulate conduct – such as littering – in which it has a significant interest. Given the many, many ordinances and regulations in effect across the country on exactly this issue, the Court's guidance is needed.

CONCLUSION

The Court should issue its writ of certiorari and review the decision of the United States Court of Appeals for the Ninth Circuit in *Klein v. City of San Clemente*, 584 F.3d 1196 (9th Cir. 2009).

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 2, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08-55015

D.C. No.
CV-07-03747-AHM

STEVE KLEIN; SUSEN FAY; M. LORRAINE KLEIN; MICHAEL LEWIS; SAUL LISAUSKAS; KRISTIN SCHUITEMAN; JEFFERSON SMITH; MARY THOMPSON; ELIZABETH WELLER; and ROBERT WELLER,

Plaintiffs-Appellants,

v.

CITY OF SAN CLEMENTE,

Defendant-Appellee.

Appeal from the United States District Court for the Central District of California,
A. Howard Matz, District Judge, Presiding

Argued and Submitted
August 4, 2008—Pasadena, California

Filed October 2, 2009

Appendix A

Before: Stephen Reinhardt, Roger J. Miner,* and Marsha S. Berzon, Circuit Judges.

BERZON, Circuit Judge:

The City of San Clemente flatly prohibits the leafleting of unoccupied vehicles parked on city streets. We conclude that petitioners are likely to succeed in demonstrating that the City's justification for its prohibition is insufficient and that they have otherwise met the requirements for obtaining a preliminary injunction enjoining enforcement of the prohibition. We therefore reverse the district court's order denying petitioners' motion for a preliminary injunction and remand for further proceedings consistent with this opinion.

Factual & Procedural Background

On June 2, 2007, Steve Klein and several cohorts (collectively "Klein") were distributing leaflets expressing their views on immigration policy. Klein initially handed leaflets to passing pedestrians but later started placing leaflets under the windshield wipers of unoccupied vehicles parked along city streets. While doing so, he was approached by several local sheriff's deputies. The deputies ordered him to stop, explaining that "throwing" or "depositing" any commercial or non-commercial advertisement "in or upon" any vehicle

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* The Honorable Roger J. Miner, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

violated a City of San Clemente anti-litter ordinance. Section 8.40.130 of the City's municipal code provides:

> "No person shall throw or deposit any commercial or noncommercial advertisement in or upon any vehicle. Provided, however, that it shall not be unlawful in any public place for a person to hand out or distribute, without charge to the receiver thereof, a non-commercial advertisement to any occupant of a vehicle who is willing to accept it."

Klein asked the deputies what they would do if he continued to leaflet parked vehicles and was told that he would be cited for violating the ordinance. He immediately stopped distributing leaflets.

Klein then filed suit in federal court, arguing that the City's vehicle leafleting ordinance, both on its face and as applied, violated his free speech rights under the First Amendment of the federal Constitution and the Liberty of Speech Clause of the California Constitution. The district court denied Klein's motion for a preliminary injunction. Klein timely appealed.

ANALYSIS

To warrant injunctive relief, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."

Winter v. Natural Res. Def. Council, __ U.S. __, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008); *see also Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.2009). "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.' " *Winter*, 129 S.Ct. at 376 (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987)).

In this case, the district court judge denied Klein's motion for a preliminary injunction solely because he concluded that the City's ordinance was narrowly tailored to serve the City's significant interest in litter prevention and "promoting esthetic values." "We will reverse a denial of a preliminary injunction where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Sammartano v. First Judicial District Court*, 303 F.3d 959, 964 (9th Cir.2002); *see also Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1047 (9th Cir.2007). Further, "[w]hen the district court is alleged to have relied on an erroneous legal premise, we review the underlying issues of law *de novo*." *Id.*; *see also Sammartano*, 303 F.3d at 964-65.

Applying those review standards, we hold that the district court's conclusion regarding Klein's likelihood of success on the merits was incorrect. On the current record, none of the interests asserted by the City were proven sufficiently weighty to justify the restrictions placed on Klein's right to express his political views.

Moreover, Klein has established the other pre-requisites for a preliminary injunction under the *Winter* standard. We therefore reverse the district court's denial of Klein's motion for a preliminary injunction and remand for further proceedings consistent with this opinion.

I.

Klein filed suit under both the California and federal Constitutions.[1] We must first "determine if the California Constitution provides independent support for [his] claim. If so, we will be able to avoid the determination of any federal constitutional issues and thus abide by the doctrine that federal courts should not decide federal constitutional issues when alternative grounds yielding the same relief are available." *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 856 (9th Cir.2004) (quotation and citation omitted).

In this case, however, the relevant standards under the federal and state constitutions are the same. The parties agree, although they arrive at this conclusion

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1. The California Liberty of Speech Clause provides, "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2(a). This clause has been interpreted to "provide[ ] protections for speakers in some respects broader than provided by the First Amendment." *Kuba*, 387 F.3d at 856; *see also L.A. Alliance for Survival v. City of Los Angeles*, 22 Cal.4th 352, 93 Cal.Rptr.2d 1, 993 P.2d 334, 341 (2000).

by different routes, that the City's ordinance should be treated as a traditional "time, place, and manner" restriction on Klein's speech.[2] California's "formulation of the time, place, and manner test was fashioned from a long line of United States Supreme Court cases, and . . . analysis of speech regulation under[the California Liberty of Speech Clause] employs time, place and manner restrictions measured by federal constitutional standards." *Id.* at 856 n. 7 (quotations and citations omitted); *see also Kuba*, 387 F.3d at 856. "Under either foundational document . . . permissible restrictions on expression in public fora must be content-neutral, be narrowly tailored to serve an important government interest, and leave open ample alternative channels for the communication of the message." *Kuba*, 387 F.3d at 856-58 (quotation omitted).[3] While Klein has the general burden of establishing the elements necessary to obtain

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2. We agree that time, place, and manner analysis is appropriate here, either under a public forum analysis, *see Kuba*, 387 F.3d at 856-57, or because placing leaflets with a political message on cars is expressive conduct. *See United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

3. The term "important government interest" refers to the same standard as the "substantial" or "significant" government interest invoked in federal First Amendment cases. *See Kuba*, 387 F.3d at 856 (noting that restriction must be "narrowly tailored to serve an important government interest," quoting *Galvin v. Hay*, 374 F.3d 739, 746 (9th Cir.2004)) and 858 (referring to government interest as "significant") and at n. 9 (citing federal cases characterizing government interest as "substantial").

injunctive relief, the city has the burden of justifying the restriction on speech. *See Kaufman v. ACS Systems, Inc.*, 110 Cal.App.4th 886, 2 Cal.Rptr.3d 296, 313 (2003) ("The party seeking to uphold a restriction on commercial speech carries the burden of justifying it," (quotations omitted)); *S.O.C. v. County of Clark*, 152 F.3d 1136, 1146 (9th Cir.1998) (holding that plaintiffs were likely to succeed on the merits because county did not meet its burden of demonstrating that its content-based ordinance was the least restrictive means to further a compelling interest).

II.

The parties agree that the ordinance is content-neutral, so the first prong of the traditional "time, place, and manner" inquiry is not at issue in this case. Thus, to justify restricting Klein's constitutionally-protected speech, the City must demonstrate that the restrictions imposed by its anti-litter ordinance are "narrowly tailored to serve a significant government interest, and that they leave open ample alternative avenues for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (citations omitted).

To satisfy the "narrowly tailored" aspect of this test, the restriction "need not be the least restrictive or least intrusive means of [serving the government's interest]," but it also may not "burden substantially more speech than is necessary to further" that interest. *Id.* at 798-99, 109 S.Ct. 2746. The existence of "numerous and

obvious less-burdensome alternatives" is relevant to assessing whether the restriction on speech reasonably fits the interest asserted. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n. 13, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993).

The City contends that the anti-litter ordinance is narrowly tailored to advance two significant interests, which we address in turn below: preventing littering and the unauthorized use of private property. The district court concluded that the ordinance was narrowly tailored to advance the anti-littering interest, and thus denied Klein's motion for a preliminary injunction. We disagree with the district court's assessment in this regard and conclude that the second interest proffered by the city, preventing unauthorized use of private property, fares no better. We therefore reverse.

A. Litter

The City first asserts an interest in "prohibiting litter and visual blight thereby preserving the aesthetics of the community."[4] Citing a line of cases addressing

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4. In referring to "litter and visual blight," the City does not suggest that the leaflets constitute litter or visual blight when they are placed on the windshields of unoccupied vehicles, but rather that they may result in visual blight if strewn on the ground. For example, the City's brief asserts that "leaflets blown off vehicles, or thrown off vehicles by angry drivers, certainly fit into" the definition of litter under city ordinances, and cites "the public blight *that would be caused by* the litter." (emphasis

(Cont'd)

municipal regulation of billboards and outdoor advertising, the City argues that "it is well-recognized that the curbing of litter and visual blight [to preserve] the aesthetics of the community are substantial governmental goals." *See, e.g., Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). The ordinance is narrowly tailored to serve this interest, the City contends, because it "only prohibits the placing of materials on unoccupied vehicles where it results in litter" and thus "target[s] the precise problem that it wished to correct."

(Cont'd)

added). Similarly, the City objects to the proposition that it could punish those who actually throw leaflets on the ground only on the basis that leaflets may be dislodged from car windshields by wind and rain, but does not contend that "visual blight" is created by the leaflets when attached to cars. As the City's asserted interest is simply preventing litter in the usual sense of the term and not the appearance of the leaflets while secured to the cars, *Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), upholding an ordinance forbidding the permanent attachment of leaflets to utility poles, is not applicable.

The City's chosen articulation of its interest is understandable, as any analogy to the governmental interest recognized in *Taxpayers for Vincent*—eliminating the "visual blight" of numerous signs attached to utility poles—would be weak. Here, the cars themselves are not permanently present on the streets, nor are the leaflets permanently affixed to the cars. Also, the leaflets are likely designed to be read only by the owner of the car, not by passersby, and so will not attract attention based on what is written on them. Any visual impact is therefore both marginal and transitory, rendering any governmental interest in eliminating it minimal.

We cannot accept the government's syllogism. The city would have to show some nexus between leaflets placed on vehicles and a resulting substantial increase in litter on the streets before we could find that the City's asserted interest in preventing littering on the street justifies a prohibition on placing leaflets on windshields. As both this court and the Supreme Court have repeatedly emphasized, "merely invoking interests . . . is insufficient. The government must also show that the proposed communicative activity endangers those interests." *Kuba,* 387 F.3d at 859 (citation omitted); *see also Schad v. Borough of Mt. Ephraim,* 452 U.S. 61, 73, 75, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (rejecting city's asserted zoning interests because it "presented no evidence"); *Bay Area Peace Navy v. U.S.,* 914 F.2d 1224, 1228 (9th Cir.1990) ("[The government] is not free to foreclose expressive activity in public areas on mere speculation about danger"); *S.O.C., Inc.,* 152 F.3d at 1146 ("[N]o evidence exists in the present record . . . to support an assumption that commercial handbillers are the inherent cause of Clark County's pedestrian flow problems."); *Sammartano,* 303 F.3d at 967 ("There must be evidence in the record to support a determination that the restriction [on speech] is reasonable."); *Berger v. City of Seattle,* 569 F.3d 1029, 1049 (9th Cir.2009) ("A governmental body seeking to sustain a restriction must demonstrate that the harms it recites are real.") (citation omitted).

Applying this evidentiary requirement and assuming that litter prevention can constitute a sufficiently significant government interest to justify an

interference with free speech,[5] the record in this case is plainly inadequate to support the government's asserted interest in restricting Klein's speech. We note that preventing a *marginal* quantity of litter is not a sufficiently significant interest to restrict leafletting. Discarded paper, coffee cups and food wrappers can also add to litter, but we remain free to carry beverages and candy bars on public streets, indicating that

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5. There is language in Supreme Court decisions suggesting that preventing littering is simply not a sufficiently significant interest to preclude leafletting. *See Schneider v. New Jersey*, 308 U.S. 147, 165, 60 S.Ct. 146, 84 L.Ed. 155 (1939) ("[T]he public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution."); *Martin v. City of Struthers*, 319 U.S. 141, 143, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) ("[The right to distribute literature] may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets."). These cases were decided before the full-blown articulation of the time, place and manner standard. It may be that, under the standard as currently articulated, the observations about littering in *Schneider* and *Martin* are best understood as applications of the "narrow tailoring" prong. *See Van Nuys Publishing Company, Inc. v. City of Thousand Oaks*, 5 Cal.3d 817, 97 Cal.Rptr. 777, 779, 489 P.2d 809 (1971) (referring to litter reduction as "a legitimate and, indeed an increasingly urgent, government objective," but, relying on *Martin* and *Schneider*, striking down an ordinance restricting door-to-door leafletting). In any event, we need not decide here whether preventing littering can ever be a significant government interest justifying a speech regulation in a public forum, as we conclude that the record is insufficient to establish such an interest here.

municipalities do not usually endeavor to eliminate all possibilities of litter. So the City must show not only that vehicle leafletting can create litter, but that it creates an abundance of litter significantly beyond the amount the City already manages to clean up.

The only evidence on this point was submitted by Klein, who stated that "if [he] securely place[s] leaflets under windshield wipers of vehicles, usually no litter will occur as a result of the leafletting activity. In those instances where some litter does occur, it usually consists of no more than one or two leaflets out of hundreds of leaflets placed on unoccupied vehicles." Preventing "one or two leaflets" from being placed on city streets does not constitute a significant government interest. *See Schneider,* 308 U.S. at 155, 157, 60 S.Ct. 146 (indicating that the governmental interest was insufficient where "many" of the hand-bills, at least 30 in one city, "lay in the gutter and in the street").

The City argues that "the Court need look no further than the Ordinance itself to find evidence of the City's interests and goals," as "the City's interest in curbing litter is evidenced by the explicit title of the ordinance[,] . . . the 'San Clemente Anti-Litter Ordinance.' " Noticeably absent from the City's argument, however, is any claim that the type of leafleting engaged in by Klein significantly increases the amount of litter in San Clemente. The title of an ordinance is not evidence of an actual problem.

Aside from the ordinance's title, all the City offers concerning its interest in limiting litter on the streets by forbidding affixing leaflets on car windshields is the equivocal promise that, "[s]hould this case go forward, . . . discovery and witnesses . . . would likely support the City's assertions." That may be, and the City will have a chance later to conduct discovery and put on witnesses. But the preliminary injunction record as it now stands contains nothing whatever to support the assertion that placing leaflets on car windshields results in a significant increase in the amount of litter on the streets.

Our conclusion that an asserted interest in preventing street litter cannot justify a prohibition on placing leaflets on car windshields accords with holdings by two of the three circuits that have addressed this very issue. *Jobe v. City of Catlettsburg*, 409 F.3d 261, 269 (6th Cir.2005) held "the commonsense explanation for these types of laws" sufficient without any proof that the problem has occurred in the past. But the Seventh Circuit disagreed, noting that "common sense . . . can all-too-easily be used to mask unsupported conjecture, which is, of course, *verboten* in the First Amendment context." *Horina v. Granite City*, 538 F.3d 624, 633 (7th Cir.2008) (citations omitted). And the Eighth Circuit invalidated a vehicle-leafletting ban "notwithstanding defendants' evidence that government officials received complaints about handbills left on cars," because the city had failed to "establish[ ] a factual basis for concluding that a cause-and-effect relationship actually exists between the placement of handbills on parked cars

and litter that impacts the health, safety, or aesthetic well-being of the defendant cities." *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1221-22 (8th Cir.1998). *Accord City of Akron v. Molyneaux*, 144 Ohio App.3d 421, 760 N.E.2d 461, 467 (2001) ("The city has not established a factual basis for concluding that a relationship actually exists between the placement of handbills on vehicles on private or public property and the prevention of litter that impacts the health, morals, peace, and welfare of the community.")

In sum, the City has not provided any evidence that placing leaflets on parked cars results in any litter, much less a more-than-minimal amount of additional litter. The district court thus clearly erred in concluding that the ordinance was narrowly tailored to advance the City's significant interest in preventing litter.

B. Unauthorized Use of Private Property

The City also asserts an "interest in preserving an individual's right to decide how and when their private property will be used." This interest is also plainly insufficient to justify the City's ordinance.

The assertion of an interest in protecting the rights of car owners runs counter to the general rule that the "right to distribute literature . . . necessarily protects the right to receive it." *Martin*, 319 U.S. at 143, 63 S.Ct. 862. When an ordinance "does not control anything but the distribution of literature," the government cannot "submit[ ] the distributor to criminal punishment for

annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it." *Id.* at 143-44, 63 S.Ct. 862.

In this case, the City's ordinance forbids Klein to distribute literature to vehicle owners who may want to receive his speech even though they are not present at the time of distribution. The Court has rejected similar attempts to "shut off the flow of" protected speech, even when the speaker seeks access to the recipient's private home, *see Martin*, 319 U.S. at 142, 63 S.Ct. 862, and even when the speech in question is commercial speech afforded "less protection . . . [than] other constitutionally safeguarded forms of expression." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).[6] The mere fact that an unwilling recipient must take the unsolicited leaflet from her windshield and place it in the garbage cannot justify an across-the-board restriction. Just as the "short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned," *id.* at 72, 103 S.Ct. 2875 (quotation omitted), so the burden on recipients of disposing of unwanted leaflets cannot justify hampering speech.

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6. In *Bolger*, the Court held that "the First Amendment does not permit the government to prohibit speech as intrusive unless the captive audience cannot avoid objectionable speech." 463 U.S. at 72, 103 S.Ct. 2875 (quotation omitted). The Court clarified that recipients of unsolicited leaflets or mailers are not a captive audience, as they "may effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* (quotation omitted).

The City may allow potential recipients to opt-out of receiving communications on their property, *see Rowan v. Post Office Dep't*, 397 U.S. 728, 737, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), as Klein recognizes by proposing that the City permit vehicle owners to post the equivalent of a "No Soliciting" sign on their dashboard to avoid unwanted leaflets. But the City's ordinance goes well beyond merely allowing unwilling recipients to opt out of car leafletting, rendering any asserted interest in preserving private property rights insufficient to support the breadth of the prohibition.

The Sixth Circuit concluded otherwise, declaring that protecting unwilling recipients of car leaflets by allowing them to place a "No Handbills" sign on the dashboard, and requiring that it be honored, represents an "unorthodox burden." *Jobe*, 409 F.3d at 272. We disagree. The Supreme Court has repeatedly held "No Solicitations" signs adequate to inform door-to-door canvassers that residents do not want unknown visitors at their homes, and has on that basis precluded broad bans on door-to-door solicitation. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002) (holding that the provision of the ordinance "which provides for the posting of 'No Solicitation' signs . . . provides ample protection for the unwilling listener."); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 639, 100 S.Ct. 826, 63 L.Ed.2d 73 (invalidating a restriction on door-to-door canvassing because "the provision permitting homeowners to bar solicitors from their property by posting signs . . . suggest[s] the

availability of less intrusive . . . measures to protect privacy."). If anything, vehicles are entitled to less assiduous protection than residences, long afforded a higher degree of privacy under our law. *See, e.g., California v. Carney*, 471 U.S. 386, 392, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985) (holding that the Fourth Amendment permits warrantless searches of cars because "[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls."). And as the Seventh Circuit noted, the alternative to vehicle-leafletting is distributing leaflets only to those available to accept them, a mode of communication that is "extremely time consuming and burdensome, particularly when the individual intends to convey a message to people who park their automobiles in a certain area of the city or who live in a certain neighborhood." *Horina*, 538 F.3d at 636.

In sum, just as the protection of private property is not a sufficiently substantial government interest to justify an across-the-board ban on door-to-door solicitation, so that interest cannot suffice to justify an across-the-board ban on placing leaflets on the windshields of empty vehicles parked on public streets.

III.

The California Supreme Court has yet to decide whether ordinances prohibiting the leafletting of unoccupied vehicles parked on public streets are incompatible with the state Constitution's Liberty of Speech Clause. Closely analogous California Supreme

Court precedent addressing door-to-door distribution of leaflets, however, has affirmed a speaker's right to leave literature on the doorsteps and porches of residences. In *Van Nuys Publishing Company, Inc. v. City of Thousand Oaks,* 5 Cal.3d 817, 97 Cal.Rptr. 777, 489 P.2d 809 (1971), the California Supreme Court struck down an anti-littering ordinance that prohibited leaving leaflets in or on the yard, porch or doorstep of private residences without prior permission. The ordinance swept too broadly by criminalizing the behavior of "those who, in delivering pamphlets, take care to secure their messages so as to eliminate the hazards of litter." *Id.* at 779-80, 489 P.2d 809. The Court noted that "[i]n the context of private residences . . . a requirement that a distributor obtain consent prior to the delivery of written material will, as a practical matter, frequently operate to curtail completely this means of communication." *Id.* at 781, 489 P.2d 809.

The *Van Nuys* Court did not, as the City suggests, rest its holding on the fact that the ordinance prohibited entry onto private property where residents might be present and willing to receive the literature. The effect of the ordinance, the Court noted, was to eliminate "the possibility of communication between a distributor and those willing recipients who are *not present* to give personal consent to the delivery of distributed literature." *Id.* at 814, 489 P.2d 809 (emphasis added, citations and quotation marks omitted). The ordinance thus "impairs a distributor's opportunity to win the

attention of all uncommitted listeners." *Id.* (citations and quotation marks omitted).[7]

More recently, a California appellate court upheld a vehicle-leafletting ban applicable to the parking lot of a private shopping center. *See Savage v. Trammell Crow Co.*, 223 Cal.App.3d 1562, 273 Cal.Rptr. 302 (1990). If *Savage* were directly analogous to this case, we would be bound to follow it as the pronouncement of a state appellate court, "[i]n the absence of a pronouncement by the highest court of a state . . . unless there is convincing evidence that the highest court of the state would decide differently." *Briceno v. Scribner*, 555 F.3d 1069, 1080 (9th Cir.2009) (citation and quotation marks omitted). But *Savage* does not concern an analogous municipal ordinance applicable to public streets. Moreover, *Savage* has been at least somewhat undermined as to what it did hold by a later California Supreme Court opinion, *Fashion Valley Mall, LLC v. NLRB*, 42 Cal.4th 850, 69 Cal.Rptr.3d 288, 301, 172 P.3d 742 (2007). For several reasons, we believe that the California Supreme Court would follow *Van Nuys*, rather than *Savage*, in deciding the validity of a municipal vehicle-leafletting ordinance, and so rely on *Van Nuys* and not *Savage*.

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7. The Georgia Supreme Court similarly concluded that an ordinance prohibiting the placement of literature in yards, driveways and porches impermissibly "bans a substantial amount of speech that residents may want to hear. . . ." *Statesboro Publ'g Co. v. City of Sylvania*, 271 Ga. 92, 516 S.E.2d 296, 298 (1999).

First, the ban in *Savage* was imposed by the owner of a private mall, making it factually and analytically distinguishable from the municipal ordinance here. The California court of appeal in *Savage* noted that the mall owner's right to impose reasonable time, place and manner restrictions stemmed from "important rights of substance," namely "freedom from disruption of normal business operations and freedom from interference with customer convenience." *Savage*, 273 Cal.Rptr. at 306 (quotation marks and citation omitted). No similar private business interests are at stake here.

Moreover, even to the degree the interests in *Savage* are not focused on conducting private business without interference, the ban was not upheld based solely on an interest in preventing littering, but took into account an additional interest not here present. The ban in *Savage* was applied in a parking lot, not a public street, and the opinion stressed that the parking lot's restricted traffic patterns led to valid concerns about "interference with ingress and egress from the center" because of the presence of the leafletters, which could "potentially increase the occurrence of traffic accidents." *Savage*, 273 Cal.Rptr. at 307, 305. It is well established that "interests in pedestrian and traffic safety, as well as in preventing traffic congestion, are significant." *Kuba*, 387 F.3d at 858. This parking lot/traffic focus makes *Savage* less persuasive authority than *Van Nuys*, which addressed interests parallel to those asserted by the City here and found that "[a] city cannot . . . preserve privacy (or attack litter) by prohibiting all distribution without prior consent."

Van Nuys, 97 Cal.Rptr. at 783-84, 489 P.2d 809 (internal quotation marks omitted).

Finally, *Savage* has been undermined, if not overruled, by *Fashion Valley Mall*. *Savage* relied repeatedly on *H-CHH Assoc. v. Citizens for Representative Gov't*, 193 Cal.App.3d 1193, 238 Cal.Rptr. 841 (1987), which held that a shopping mall could prohibit the solicitation of contributions or donations because the mall's "function is to facilitate the ease of commerce and to promote the business of its merchant tenants," and any solicitation of political funds is in tension with that function. *H-CHH*, 238 Cal.Rptr. at 859; *see Savage*, 273 Cal.Rptr. at 306-07 (citing *H-CHH* four times). The California Supreme Court recently disapproved *H-CHH* in *Fashion Valley Mall*, 69 Cal.Rptr.3d. at 301, 172 P.3d 742 (holding that a union was entitled to conduct a peaceful boycott of one of the mall's tenants).[8] The court in *Savage* did not cite *H-CHH* for the precise point of law that the California Supreme Court specifically rejected in *Fashion Valley Mall*. But *Savage*'s focus on mall owners' prerogative to limit speech so as to further its interests as a property owner has been undermined by the Court's strong affirmation of free speech rights in the shopping mall context in *Fashion Valley Mall*.

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8. Fashion Valley Mall relied on *H-CHH* in arguing that, because malls could prohibit financial solicitation as fundamentally incompatible with the mall's function, they could prohibit boycotts against stores in the mall for the same reason. The Court rejected this line of analysis. *Fashion Valley Mall*, 69 Cal.Rptr.3d at 301-02, 172 P.3d 742.

In sum, we conclude that *Van Nuys* strongly supports our conclusion that under California law a vehicle leafletting ban cannot be justified by an interest in protecting the private property rights of recipients of leaflets. We have a firm basis for believing that, in a case similar to this one, the California Supreme Court would follow *Van Nuys* and not *Savage*, a later intermediate appellate decision involving different circumstances and undermined by subsequent California Supreme Court authority.

IV.

Klein has thus demonstrated a likelihood of success on the merits of his claim that the City's anti-litter ordinance violates his right to free speech under the California Constitution, as the City has not shown that the ordinance is narrowly tailored to advance either of its asserted interests. To warrant injunctive relief, however, Klein must also demonstrate that he is likely to suffer irreparable injury in the absence of a preliminary injunction, and that the balance of equities and the public interest tip in his favor. *See Winter*, 129 S.Ct. at 374. If we were in doubt whether Klein satisfied the remaining requirements for injunctive relief, we would remand to allow the district court to assess the likelihood of irreparable injury and to balance the equities. Given the free speech protections at issue in this case, however, it is clear that these requirements are satisfied.

Both this court and the Supreme Court have repeatedly held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *see also Sammartano*, 303 F.3d at 973-74; *S.O.C., Inc.*, 152 F.3d at 1148; *Jacobsen v. U.S. Postal Service*, 812 F.2d 1151, 1154 (9th Cir.1987). The harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as "timing is of the essence in politics" and "[a] delay of even a day or two may be intolerable. . . ." *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1020 (9th Cir.2008) (quoting *NAACP v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir.1984)). Klein has therefore demonstrated a likelihood of irreparable injury in the absence of an injunction.

We have also consistently recognized the "significant public interest" in upholding free speech principles, *see Sammartano*, 303 F.3d at 974 (collecting cases), as the "ongoing enforcement of the potentially unconstitutional regulations . . . would infringe not only the free expression interests of [plaintiffs], but also the interests of other people" subjected to the same restrictions. *Id.* In this case, the City's ordinance prohibits any potential speaker from placing leaflets on unoccupied parked vehicles, regardless of the type of leaflet or the would-be recipients' willingness to receive the speech. The ordinance thus infringes on the free speech rights not only of Klein, but also of anyone seeking to express their views in this manner in the City

of San Clemente. The balance of equities and the public interest thus tip sharply in favor of enjoining the ordinance. As our caselaw clearly favors granting preliminary injunctions to a plaintiff like Klein who is likely to succeed on the merits of his First Amendment claim, we see no reason to remand for further proceedings with respect to Klein's motion in this case.

Conclusion

The record does not support the district court's conclusion that the City's anti-litter ordinance was narrowly tailored to serve a significant government interest. Moreover, the ongoing violation of Klein's right to express his political beliefs constitutes irreparable injury, and the public interest strongly favors enforcing free speech protections. The district court's order denying a preliminary injunction is therefore **REVERSED**, and this case is **REMANDED** to the district court for further proceedings consistent with this opinion, including the issuance of an appropriate injunction.

APPENDIX B — ORDER DENYING PRELIMINARY INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED NOVEMBER 28, 2007

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 07-3747 AHM (JTLx)

STEVE KLEIN, et al.,

Plaintiffs,

v.

CITY OF SAN CLEMENTE, et al.,

Defendants.

ORDER DENYING PRELIMINARY INJUNCTION

I. INTRODUCTION

A. *Procedural Background*

On June 11, 2007, Plaintiffs filed a complaint in this Court against Defendant City of San Clemente ("City"), alleging that San Clemente Municipal Code Section 8.40.130 ("the Ordinance"), prohibiting the leafleting of parked vehicles, is, on its face and as applied, an unconstitutional violation of the First Amendment.

Appendix B

Plaintiffs are a group of individuals who, allegedly motivated by their political beliefs, distributed leaflets on the subject of illegal immigration in the City of San Clemente on June 2, 2007. (Second Declaration of Steve Klein ("Klein Decl.")). "When pedestrian traffic slowed," they securely placed leaflets under the windshield wipers of vehicles parked on City streets. (*Id.* ¶ 4.) Plaintiffs were stopped by Orange County Sheriff's Deputies. (*Id.* ¶ 5). The deputies, who provide law enforcement to San Clemente, ordered them to stop placing leaflets on the parked cars. (*Id.* ¶¶ 6, 8.) A Deputy Sheriff told Plaintiffs that they would be cited for violating the law if they did not cease placing leaflets on the cars. (*Id.* ¶ 9.) Plaintiffs allege that they "did not wish to stop the leafleting of vehicles parked on public streets, but [they] feared arrest and prosecution if [they] did not stop." (*Id.* ¶ 11.) "Fearing arrest and prosecution, [Plaintiffs] also canceled future plans to place leaflets on vehicles parked" on San Clemente streets. (*Id.* ¶ 12.)

On June 26, 2007, Plaintiffs moved for a Temporary Restraining Order ("TRO"), prohibiting defendant City from enforcing Section 8.40.130 until the Court could hear and resolve a motion for a preliminary injunction. On July 6, 2007, the Court denied Plaintiffs' motion because they "failed to meet the requisite standard for obtaining injunctive relief."

On August 20, 2007, the Court denied the City's motion to dismiss Plaintiffs' Complaint and the City's request for a more definite statement. On October 5, 2007, the City filed an Answer to Plaintiffs' Complaint.

Appendix B

On October 1, 2007, Plaintiffs moved for a Preliminary Injunction, prohibiting defendant City from enforcing Section 8.40.130. For the reasons set forth below, the Court DENIES the motion.[1]

B. *The Ordinance*

The ordinance Plaintiffs seek to enjoin states, in relevant part:

> No person shall throw or deposit any commercial or noncommercial advertisement in or upon any vehicle. Provided, however, that it shall not be unlawful in any public place for a person to hand out or distribute, without charge to the receiver thereof, a noncommercial advertisement to any occupant of a vehicle who is willing to accept it.
>
> San Clemente Municipal Code §8.40.130 (Mot. Ex. 1).

C. *New Factual and Legal Allegations Supporting this Motion*

Plaintiffs have now clarified that they "securely placed [their] leaflets under the windshield wipers of vehicles" parked on City streets. (*Id.* ¶ 4.) Plaintiffs have also provided the Court with a copy of such leaflet. (Klein Decl. Ex. 1.) The leaflet is noncommercial and involves

1. Docket No. 29.

an issue of public interest. It expresses opposition to and criticism of "illegal aliens" and those public officials who supposedly fail to enforce immigration laws.

Plaintiffs also contend that when they handed out the leaflets to pedestrians on June 2, 2007, "several recipients expressed appreciation at receiving a leaflet and expressed a desire to receive it." (Klein Decl. ¶ 3.) Plaintiff Steve Klein ("Klein") also asserts, based on his extensive experience in distributing political issue flyers, candidate statements and voting guide leaflets, that if leaflets are securely placed "under windshield wipers of vehicles, usually no litter will occur as a result of the leafleting activity." (*Id.* ¶ 24.) He also contends, albeit without factual support or corroboration, that "very few drivers will throw a leaflet on the ground when they receive one on their vehicle" and that "most people do not mind receiving leaflets on their vehicles." (*Id.* ¶¶ 25-26.)

Klein further asserts that leafleting parked vehicles enables one to communicate his message to many more recipients than by the "exhausting and impractical" alternative of "running up to a driver" or by leafleting people hurrying by as they leave a public facility, such as a stadium. (Klein Decl., *passim.)*

Also new is evidence from two "long-time political activist[s]," Wally Clark and Sylvia Sullivan. Their declarations largely repeat Klein's contentions that "[l]eafleting vehicles is a well-established form of expressive activity," that "no litter will result from the

leafleting activity," and that in the past "person-to-person leafleters" have been "angrily confronted by pedestrians who disagreed with their message and committed violence by pushing or shoving them." (Sullivan Decl. ¶¶ 7, 13, 20; Clark Decl. ¶¶ 7, 13, 20.)

In addition to supplementing their case with the foregoing "facts," which go directly to both the purpose of the Ordinance (prevention of litter) and the impact on Plaintiffs' rights of speech, Plaintiffs' motion now stresses that enforcement of the Ordinance violates their rights under Article I, §2 of the California Constitution, which provides greater protection for speech than does the United States Constitution. Plaintiffs so alleged in Count II of the Complaint, but they did not urge this in their papers seeking a TRO.

Next, Plaintiffs have abandoned their prior argument that the vehicles on which they sought (and still seek) to place leaflets are properly classified as public forum. Instead, they now argue that "Further research, however, establishes that [vehicles are] private property [on which an effort to place speech] does not involve forum analysis at all." Consistent with that fundamental revision in their argument, Plaintiffs continue that "The public forum doctrine applies to public property and has never extended beyond property owned by the government. See *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 681 (1992) . . . ." Plaintiffs also cite *Deida v. City of Milwaukee*, 176 F.Supp. 2d 859, 868 (E.D. Wisc. 2001) for the proposition that "[a] vehicle is private property, and thus is neither a public nor a non-public forum."

Because their attempts at "speech" are confined to private property, Plaintiffs argue next, what the Court must focus on is "the law's effect on willing recipients' constitutional right to receive speech."[2]

Then, turning to yet another "new" contention, Plaintiffs argue that the Ordinance is not narrowly tailored, because the City has three "less onerous options" to deal with any potential litter problem: (1) Punish those who receive the leaflets and then choose to litter. (2) Require "activists to place leaflets securely on a vehicle, *e.g.*, under windshield wipers." (3) Have private citizens who do not want leaflets on their vehicles place a sign to that effect on the dashboard.

Finally, and perhaps most importantly, Plaintiffs cite several cases, especially *Kuba v. 1-A Agr. Ass'n*, 387 F.3d

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2. According to Professor Erwin Chemerinsky, "[t]here is not a right to use private property owned by others for speech. Because it is private property, the Constitution does not apply. Most of the cases involving a right to use private property for speech have concerned claims of a right to use privately owned shopping centers for expression." Erwin Chemerinsky, Constitutional Law: Principles and Policies § 11.4.3, 1103 (Aspen 2d ed. 2002). Professor Chemerinsky notes that under the First Amendment there is no right to use such centers for speech, citing *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976). However, as discussed below, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) the Supreme Court held "that states could recognize a state constitutional right of access to shopping centers." *Id.* at 1104 (holding that the California Constitution protects speech and petitioning, reasonably exercised, in privately owned shopping centers).

850, 859-60, 862 (9th Cir. 2004), for the proposition that it is defendant who shoulders the burden of establishing the constitutionality of the ordinance, which requires it to establish a realistic basis for using the ordinance to deal with an actual problem — *i.e.*, litter. On this point, Plaintiffs are correct. The City has the burden to establish that all of the "time, place and manner" factors are satisfied. *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990).

D. *Issues Requiring Additional Analysis*

The new or modified issues that now require analysis are:

> (1) On the basis of their California Constitution claims, are Plaintiffs entitled to a preliminary injunction?
>
> (2) Does the clarified and narrowed manner of expression that Plaintiffs seek to engage in (*i.e.*, to place leaflets only underneath the windshield wiper) require a different result on their First Amendment claims — *i.e.*, does it warrant entering an injunction?
>
> (3) Did the City tailor the Ordinance narrowly enough to allow for its enforcement?
>
> (4) May Plaintiffs assert the First Amendment rights of putative recipients of

> their leaflets, and if so, have Plaintiffs made a showing sufficient to enjoin (preliminarily) enforcement of the Ordinance?

Defendant's opposition reflects an astounding carelessness, verging on indifference, in failing to address these issues meaningfully. Notwithstanding that failure, the Court nevertheless DENIES the injunction.

II. LEGAL STANDARD FOR A PRELIMINARY INJUNCTION

As stated in *Raich v. Gonzales*, 500 F.3d 850, 857-58 (9th Cir. 2007),

> "'The standard for granting a preliminary injunction balances the plaintiff's likelihood of success against the relative hardship to the parties.' *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). We have two different criteria for determining whether preliminary injunctive relief is warranted. 'Under the traditional criteria, a plaintiff must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to [the] plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).' *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005) (internal quotations omitted). We also use an

> alternative test whereby a court may grant the injunction if the plaintiff demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in his favor."
>
> The two alternative formulations 'represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They are not separate tests but rather outer reaches of a single continuum.' *Baby Tam & Co. v. City of Las Vegas,* 154 F.3d 1097, 1100 (9th Cir. 1998) (internal quotation marks and citations omitted). *Id.* at 858.

III. DOES THE ORDINANCE VIOLATE THE LIBERTY OF SPEECH CLAUSE OF THE CALIFORNIA CONSTITUTION?

A. *The Court Must Apply California Law First.*

Initially, the Court must determine if the California Constitution provides "independent support" for Plaintiffs' claim. *Kuba v. 1-A Agr. Ass'n,* 387 F.3d 850, 856 (9th Cir. 2004) (citing *Carreras v. City of Anaheim,* 768 F.2d 1039, 1042 (9th Cir. 1985), abrogated on other grounds by *Los Angeles Alliance for Survival v. City of Los Angeles,* 22 Cal.4th 352 (2000)). If the California Constitution does provide "independent support" for

Plaintiffs' claim, "then there is no need for decision of the federal issue." *Carreras*, 768 F.2d at 1042 ("The doctrine that federal constitutional issues should be avoided if a case can be decided on state law grounds is a corollary of the general principle that federal courts should avoid the adjudication of federal constitutional issues when alternative grounds are available.") (citations omitted).

B. *The California Constitution Provides Broader Protection of Speech than the Federal Constitution*

The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. Amend. I. This is somewhat narrower than Article I, § 2(a) of the California Constitution (the "Liberty of Speech Clause"), which provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

"The California Constitution provides protections for speakers in some respects broader than provided by the First Amendment of the Federal Constitution." *Kuba*, 387 F.3d at 856 (citing *Los Angeles Alliance for Survival*, 22 Cal.4th at 352, 367 ("This court, and the California Courts of Appeal, likewise have indicated that the California liberty of speech clause is broader and more protective than the free speech clause of the First Amendment."). For example, in *Robins v. Pruneyard*

Shopping Center, 23 Cal.3d 899, 910 (1979), *aff'd. sub nom. PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the California Supreme Court held that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." The California Supreme Court based its conclusion on "the public character of the shopping center" and the fact that the owner "has fully opened his property to the public." *Robins*, 23 Cal.3d at 910 (citation omitted). These factors are not present here. Moreover, in *Golden Gateway Center v. Golden Gateway Tenants Assn.*, 26 Cal.4th 1013, 1016 (2001), the California Supreme Court held that a tenants association had no right under the California Constitution to distribute a newsletter in a privately owned apartment complex. In its opinion, the Court filled a "gap" in *Robins* by holding that "California's free speech clause contains a state action limitation." *Id.* at 1023. In so doing, it cast doubt on whether *Robins* was correctly decided. *Id.* at 1022. And in a concurring opinion, Chief Justice George stated, in dicta, that "[e]ven if the apartment complex at issue had been publicly owned (and thus the state action doctrine clearly satisfied), the state constitutional right of free speech would not extend to the unsolicited distribution of pamphlets in the interior hallways of an apartment building that is not generally open to the public." *Id.* at 1036. The Court of Appeal for the 4th District quoted Chief Justice George's language in *Costco Companies, Inc. v. Gallant*, 96 Cal.App.4th 740, 748 (2002), where it applied a "time, place and manner" analysis to uphold a retailer's restrictions on signature-gathering outside its stores.

C. *Although the Issue Is Not Settled, it Appears That California Courts Use Federal Forum Analysis to Determine the Nature of a Forum.*

The first, or threshold, inquiry in analyzing whether an ordinance violates the First Amendment or California's "Liberty of Speech Clause" is to determine whether strict scrutiny or a more relaxed standard of review is applicable. That requires deciding, among other factors, the nature of the forum where the "speech" was to be communicated.[3]

A recent and pithy iteration of the federal test is set forth in *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007), as follows:

> Accordingly, we apply a forum analysis to determine when the government has legitimate interests in restricting the use of a forum to certain intended purposes that outweigh a speaker's interest in using the forum for a different purposes. [sic] . . . Forum analysis has traditionally divided government proerty into three categories: public fora, designated public fora, and nonpublic fora. Once the forum is identified, we determine

---

3. Among the other factors is whether the challenged ordinance is content-based (if so, it is presumptively unconstitutional and strict scrutiny is necessary, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)). The Ordinance in question here is not content-based.

whether restrictions on speech are justified by the requisite standard . . . .

On one end of the fora spectrum lies the traditional public forum, "places which by long tradition . . . have been devoted to assembly and debate.". . . Next on the spectrum is the so-called designated public forum, which exists "[w]hen the government intentionally dedicates its property to expressive conduct.". . . A designated public forum cannot exist in the absence of specific action on the part of the government . . . A content-based restriction on speech in a public or designated public forum is subject to strict scrutiny, requiring the state to show a compelling interest in the restriction that is drawn narrowly to meet that interest . . . A content-neutral time, place, and manner restriction is permissible so long as it is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication. . . ."

At the opposite end of the fora spectrum is the non-public forum. The non-public forum is "[a]ny public property that is not by tradition or designation a forum for public communication." . . . We subject speech restrictions in a non-public forum to less-exacting judicial scrutiny: "[A]s long as the regulation on speech is reasonable and not an

> effort to suppress expression merely because public officials oppose the speakers view," the government may preserve the forum for its intended purposes. *Perry*, 460 U.S. at 46, 103 S.Ct. 948. (Most citations deleted.)

Plaintiffs contend that the California Constitution "allows a more lenient test for determining whether a particular area is suitable for speech." They cite *Kuba* for the proposition that "[t]he standard under the California Constitution for whether a particular area is a 'public forum' is one aspect of constitutional law in which the California Constitution varies from its federal cousin." *Kuba*, 387 F.3d at 856.

Kuba states that under California's Liberty of Speech Clause, "the 'public forum' doctrine is not limited to traditional public forums such as streets, sidewalks, and parks or to sites dedicated to communicative activity. Rather, the test under California law is whether the communicative activity is basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 856. However, the California Court of Appeal recently concluded that it uncovered no post-1984 "California cases adopting this 'basic incompatibility' test when analyzing the nature of a forum." *San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist.*, 154 Cal.App.4th 866, 885 n.15 (2007) (noting instead that the "basically incompatible" language "is utilized in federal cases in the context of deciding whether a given regulation constitutes a reasonable time, place, and manner restriction"). Thus,

although "[m]indful that [California's] constitutional guarantee of freedom of speech is broader than the federal provision," in *San Leandro* the California Court of Appeal analyzed the nature of the forum at issue in that case "under federal precedent." *Id.* at 887.

D. *Regardless of What Test Is Used, The Forum at Issue Here Is Not A Public Forum.*

This Court need not choose whether to follow the Ninth Circuit's adoption in *Kuba* of the old "basic incompatibility" test or instead to follow *San Leandro Teachers Association* and apply federal precedent. It is unnecessary to choose between the two approaches because now Plaintiffs agree with Defendant that the "forum" in question here — parked unoccupied vehicles on public streets — is not public to begin with.

E. *The Merits of Plaintiffs' California-Based Claims*

1. *Burden of Proof*

Although Plaintiffs have the burden of establishing the elements necessary to obtain injunctive relief, "[t]raditionally and logically . . . the party seeking to restrict protected speech has the burden of justifying that restriction." *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000). California courts agree. *See e.g., Kaufman v. ACS Systems, Inc.*, 110 Cal.App.4th 886, 906 (2003) (holding that the "party seeking to uphold a restriction on commercial speech carries the burden

of justifying it."). On this motion, then it was up to the City to justify the Ordinance, not just in terms of its stated purpose, but also in terms of its application to these facts.

As recently reiterated in *Desert Outdoor Advertising, Inc. v. City of Oakland*, __ F.3d __, 2007 WL 3225883 at *3 (9th Cir. October 30, 2007), a court is "obligated to interpret a statute, if it is fairly possible, in a manner that renders it constitutionally valid." (citations deleted)

2. *"Time, Place and Manner" Standards Govern*

According to *Jobe v. City of Catlettsburg*, 409 F.3d 261, 267 (6th Cir. 2005), "Once *Taxpayers for Vincent* [*Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)] had concluded that the ordinance at issue did not regulate a public forum, it proceeded to apply the traditional time-place-manner test to the regulation." *Cf. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) ("The 'time, place, or manner' test was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a 'public forum,' although we have on at least one occasion applied it to conduct occurring on private property.") (citations omitted).

Although the windshield of a vehicle differs greatly as a forum from a shopping center and here a city enacted the restriction rather than the owner of a

shopping center, the clearest articulations of California law with respect to rights of expression on private property arise in cases where shopping centers are involved. In such circumstances, California courts also apply the federal "time, place and manner" standards. *See Costco Companies, Inc. v. Gallant, supra,* 96 Cal.App.4th at 745 ("In recognizing the right of free expression extends in some instances to privately owned property, the [California Supreme Court in *Robins*] nonetheless expressly acknowledged private property owners, like governmental agencies, may regulate speech as to 'time, place and manner.'"); *Savage v. Trammell Crow Co.,* 223 Cal.App.3d 1562, 1572 (1990) (After reviewing a series of California decisions addressing the free speech rights of California citizens in privately owned shopping centers, the court concluded that although a citizen's "right to engage in expressive activity at shopping centers is found solely in the broader protection provided by California's Constitution, a shopping center's power to impose time, place and manner restrictions on such activity is nonetheless measured by federal constitutional standards."); *Kuba,* 387 F.3d at 857 ("California's 'formulation of the time, place, and manner test was fashioned from a long line of United States Supreme Court cases.'") (citation omitted). Accordingly, the Court will rely on mostly federal authorities in analyzing the constitutional issues.[4]

---

4. In *People v. Ufindell,* 90 Cal.App.2d Supp. 881, 882-83 (1949), a California appellate court affirmed the defendant's criminal conviction for violating a penal ordinance that provided, in relevant part, that "it shall be unlawful to deposit

(Cont'd)

To qualify as a reasonable time-place-and manner regulation of speech, an ordinance must (1) be content neutral and (2) serve a significant government interest and (3) be narrowly tailored to serve that government interest and (4) permit sufficient alternative channels of communication. *Taxpayers for Vincent, supra,* at 808, 815. Here, there is no dispute that the Ordinance is content neutral. So the Court will address the remaining components.

3.

The City argues that "the Ordinance advances two significant interests: (1) the government's interest in prohibiting litter and visual blight thereby preserving the aesthetics of the community, and (2) the individual's interest in having their [sic] private property left alone by those who do not have permission to use it." While Plaintiffs concede that litter prevention is a legitimate state interest, they argue that it is not a significant state interest. This Court disagrees. If littering is allowed to occur and does occur, the litter undermines the City's significant interests in promoting esthetic values.

(Cont'd)
in or on any motor vehicle parked on any street in the City of San Diego any advertising matter." With minimal analysis, the court held that the ordinance did not violate the defendant's "freedom of speech or press guaranteed by the Federal and State Constitutions." *Id.* at 883. The decision has not been cited by any other court, lacks any reference to later-established (and still applicable) First Amendment jurisprudence and is entitled to no weight whatsoever.

See Taxpayers for Vincent, 466 U.S. at 806 (Curbing littering and the visual blight that comes with it advances the city's "weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression."); *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (four-justice plurality) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further-traffic safety and the appearance of the city-are substantial governmental goals. It is far too late to contend otherwise."). The most applicable precedent is *Jobe v. City of Catlettsburg*, *supra*, 409 F.3d at 273-74. The careful opinion in that case begins with this pithy formulation of the issue present here: "May a city, consistent with the First and Fourteenth Amendments, prohibit individuals from placing leaflets on car windshields and other parts of a vehicle without the consent of the owner?" *Id.* at 262. The court concluded that a city may do so, summarizing its reasons as follows:

> Because the law represents a content-neutral restriction on the time, place and manner of speech, because the law narrowly regulates the problems at hand (littering, visual blight and unauthorized use of private property), because the law leaves open ample alternative avenues for distributing leaflets in an inexpensive manner (face-to-face on a public street and door-to-door in a neighborhood) and because the law has much in common with a ban on placing signs on utility poles *see Members of City Council of Los Angeles*

v. Taxpayers for Vincent, 466 U.S. 789 (1984) . . .

Jobe, 409 F.3d at 262.

Plaintiffs attempt to undermine *Jobe's* reliance on *Taxpayers for Vincent* by contending that *Taxpayers for Vincent* was based on the right of the defendant City of Los Angeles to promote and protect esthetic interests, in contrast to the San Clemente Ordinance dealing with littering. This, too, is a distinction without much of a difference. If littering is allowed to occur and does occur, the litter obviously undermines the City's interests in promoting esthetic values. As stated in *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998), cities "have a substantial interest in protecting the aesthetic appearance of their communities by avoiding visual clutter . . . ." In any event, fundamentally *Taxpayers for Vincent* is not really dependent on the fact that the purpose of the ordinance was primarily to curb visual blight.

Plaintiffs next cite *Desert Outdoor Advertising, Inc. v. The City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996) for the proposition that the Ordinance here does not pass constitutional muster because prior to the filing of this lawsuit, San Clemente provided no reason or purpose for its enactment. *Desert Outdoor Advertising* is of little help to Plaintiffs, because a city has a recognizable and legitimate interest in preventing littering, and Section 8.40.130 reflects San Clemente's objective to do so. That Ordinance is part of Chapter

8.40 of the Municipal Code of San Clemente, which is entitled "LITTER." Recently, in *Get Outdoors II, LLC v. City of San Diego*, __ F.3d __ 2007 WL 3197108 at *5 (9th Cir. Nov. 1, 2007), the Ninth Circuit upheld a city's restrictions on billboards. It stated,

> The City has stated that the purpose of its sign code is "to optimize communication and quality of signs while protecting the public and the aesthetic character of the City." SDMC § 142.1201. That is all our review requires to prove a significant interest. *See Ackerley v. Krochalis*, 108 F.3d 1095, 1099-1100 (9th Cir. 1997).

The Ninth Circuit also recently stated that "[i]n the context of regulating commercial speech our case law does not require" that a city "conduct studies showing that offsite signs have an adverse effect upon the city's aesthetics or safety." *Outdoor Media Group, Inc. v. City of Beaumont.* __ F.3d __, 2007 WL 3197112 at *6, n.8 (9th Cir. Nov. 1, 2007).

Plaintiffs nevertheless cite Judge Collins's decision in *Khademi v. South Orange County Community College District*, 194 F.Supp. 2d 1011, 1035-36 (C.D. Cal. 2002). Apart from the fact that this Court is not bound by a decision of another colleague on this Bench, *Khademi* would not be dispositive in any event. In the applicable portion of that wide-ranging opinion, Judge Collins relied heavily on the Eighth Circuit's decision in *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1221-22 (8th

Cir. 1998). The court in *Jobe*, which was decided seven years after *Krantz* and five years after *Khademi*, declined to adopt the *Krantz* court's reasoning. Indeed, *Jobe* expressed flat disagreement with three facets of the *Krantz* analysis. It rejected the Eighth Circuit's decision to assume that the placing of fliers on cars is not littering. It faulted *Krantz* for not addressing *Taxpayers for Vincent*. And it criticized *Krantz* for failing to account for the fundamental difference between traditional leafleting on the one hand and the activities of both Jobe and Krantz on the other. In that regard, *Jobe* sensibly noted that the windshield of a vehicle does not occupy the same place "in the long-accepted traditions of leafleting . . . that governments may regulate only with the utmost care." *Id.* at 274.

4. *The Ordinance is Narrowly Tailored*

The Ordinance advances these interests in a narrow and constitutionally permissible way. In *Jobe*, the Sixth Circuit stated that "[a]s in *Taxpayers for Vincent*, where Los Angeles banned the posting of signs on public property, 'the substantive evil' at issue-visual blight there, littering on private property here-is not merely a possible by-product of the activity, but is created by the medium of expression itself." 409 F.3d at 269 (citation omitted). Thus, the Sixth Circuit concluded that the ordinance "responds precisely to the substantive problem which legitimately concerns the City [and] curtails no more speech than is necessary to accomplish its purpose." The same is true here. The Ordinance targets the precise problem-littering that results from

leafleting on private vehicles-that the City seeks to correct. The Ordinance also curtails no more speech than is necessary to prevent littering because it leaves open ample alternative channels of communication in the same location at the same time. As the United States Supreme Court has "emphasized on more than one occasion, when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill v. Colorado*, 530 U.S. 703, 726 (2000). "Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (citation omitted).

Plaintiffs nevertheless contend that the City could and should control littering by punishing those who receive the leaflets and then choose to litter. In *Jobe*, the Sixth Circuit addressed this argument:

> Placing unrequested leaflets on privately owned cars, moreover, amounts to a form of littering no less than placing leaflets on privately owned lawns or directly on the public streets. There is nothing special about a car-or, for that matter, about a bicycle, a baby stroller, an individual's back or a lawn-that invites others to place leaflets or advertisements on it without the owner's

> consent . . . [Thus] parking a car on a public street is not an invitation to place literature on the car or, worse, to become a vehicular sandwich board for another citizen's message of the day . . . Unlike traditional leafletting, the recipient of an advertisement or other pamphlet on a car windshield has no choice in receiving the literature, no choice in accepting the burden of disposing of it and no choice in peeling it off the windshield after a rain shower.

409 F.3d at 270-71.

Plaintiffs also argue that the Ordinance is not narrowly tailored because it fails to account for drivers who want to receive leaflets. They suggest that private citizens who do not wish to have leaflets placed on their vehicle may place a sign on their dashboard indicating their unwillingness to accept leaflets. In *Jobe*, the court noted that a "windshield wiper is not a communications device and has never taken on the trappings of one." 409 F.3d at 272. Because vehicle windshields are not an established forum for communication, it makes "little sense" to place the burden on vehicle owners to express their unwillingness to receive leaflets on their vehicles. *Id.*

Finally, Plaintiffs contend that the Ordinance is not narrowly tailored because the City has the "less onerous" option of requiring "activists to place leaflets securely on a vehicle, *e.g.*, under windshield wipers." An

ordinance generally prohibiting leafletting but permitting it if the papers are placed under the wiper might burden speech less than this Ordinance and could help curb litter. But that alternative would require law enforcement officers to make the additional determination of whether the leaflet was placed "securely" on a vehicle or sufficiently "under" a windshield. Moreover, such a narrowed ordinance probably would not really reduce litter because it fails to account for the likelihood that rain or wind could dislodge the leaflet from the windshield wiper and that drivers would throw leaflets onto the street after removing them from beneath the windshield wipers. In any event, such a precisely-framed regulation is not constitutionally mandated. A regulation may be narrowly tailored even without being "the least restrictive or least intrusive means of serving the statutory goal." *Hill v. Colorado*, 530 U.S. 703, 726 (2000). The "narrow tailoring" requirement is satisfied here because the substantial government interest of litter prevention "would be achieved less effectively absent the regulation." *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).[5]

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5. It is true that in *Deida v. City of Milwaukee*, 176 F.Supp. 2d 859 (E.D. Wisc. 2001), the court held that an ordinance that prohibited anyone from "plac[ing] any . . . pamphlet in or on any vehicle, whether or not the vehicle is occupied" violated the First Amendment. The ordinance in question was content-based, so the court applied a "strict scrutiny" test, and found that the city's justification for the ordinance did not meet the "compelling" standard. Because the City is not required to demonstrate that its interest in preventing litter is "compelling," the holding in *Deida* is not dispositive here.

5. *The Ordinance Leaves Open Ample Alternative Channels for the Communication of Plaintiffs' Message.*

Plaintiffs contend that placing leaflets on vehicles is the safest and most cost-effective means to communicate their message. Although courts are sensitive to the need to permit inexpensive methods of spreading information, "this solicitude has practical boundaries." *Taxpayers for Vincent,* 466 U.S. at 812 n.30. "In the end, the fact that a means of communication is efficient and inexpensive does not automatically trump other government interests." *Jobe,* 409 F.3d at 273. "At some point, the very cheapness of a mode of communication may lead to its abuse." *Id.*

Like the ordinance in *Taxpayers,* the Ordinance here "does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of" leaflets is prohibited. *Taxpayers for Vincent,* 466 U.S. at 812. The Ordinance explicitly permits Plaintiffs to engage in other speech on the same issue and in the same general area, by distributing leaflets directly to pedestrians or to the occupants of vehicles. Plaintiffs are also free to distribute leaflets to residents of private residences or to mail such information to them. Thus, the Ordinance leaves open ample alternative channels for Plaintiffs to communicate their message in an inexpensive and efficient manner.

Appendix B

F. *First Amendment Rights of Putative Recipients*

Plaintiffs argue that "when the government restricts speech on private property, a court must analyze the law's effect on willing recipients' constitutional right to receive speech . . . As such, in addition to applying the time, place, and manner test, a court must also examine the impact of a law on willing recipients."

To support this contention, Plaintiffs merely cite cases stating the general proposition that there is "a constitutional right to receive information." *See e.g., Martin v. City of Struthers,* 319 U.S. 141, 143 (1943) (The First Amendment "embraces the right to distribute literature . . . and necessarily protects the right to receive it.") (citation omitted). As the Supreme Court stated a half-century later, "[f]or over 50 years, the [Supreme] Court has invalidated restrictions on door-to-door canvassing and pamphleteering." *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton,* 536 U.S. 150, 161-62 (2002) (noting "the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas"). However, other than cases in which courts ruled unconstitutional laws prohibiting such leafleting or solicitation, Plaintiffs cite no cases where a court struck down an otherwise constitutional restriction on speech because it violated the First Amendment rights of

putative recipients to receive the information. On this record, the Court declines to do so.[6]

G. *Irreparable Injury*

In its July 6, 2007 Order, the Court held that Plaintiffs did not establish irreparable injury, "given that their rights of expression have hardly been curtailed, much less fully curtailed." Order at 5. Plaintiffs contend that "[a] lower threshold for granting a preliminary injunction applies to free speech cases." Plaintiffs cite *Elrod v. Burns*, 427 U.S. 347, 373 (1976) for the proposition that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."

Elrod is not applicable. First, as this Court now has found, Plaintiffs have not established a California Constitution or First Amendment right to leaflet unoccupied parked vehicles–or, at the very least (and more precisely)–they have not established a likelihood of doing so. Second, the plaintiffs in *Elrod* had not even

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6. Plaintiffs also rely on *Clement v. Cal. Dept. of Corrections*, 364 F.3d 1148, 1151 (9th Cir. 2004), in which the Ninth Circuit held that a regulation prohibiting prison inmates from receiving mail containing material downloaded from the Internet violated the inmates' First Amendment rights. In *Clement*, contrary to what Plaintiffs contend, the Ninth Circuit did not apply a test that analyzed a law's effect on willing recipients' constitutional right to receive speech; the Ninth Circuit instead applied the Supreme Court's "four factor test to determine whether a prison policy serves legitimate penological objectives." *Id.* at 1151-52.

engaged in speech, as such; it was the right of association that the employees asserted. Which leads to the third distinction: the *Elrod* plaintiffs challenged patronage dismissals, as to which the Supreme Court found no justification sufficient to override that right of association. Less drastic means were available to achieve the stated objective. Here, the Ordinance has a justification, it is narrowly-phrased and applied, and Plaintiffs have an alternative means of expression available to them, unlike the *Elrod* employees whose very livelihoods were threatened.

IV. CONCLUSION

The foregoing analysis applied both California and federal standards in concluding that the Ordinance violates neither the Liberty of Speech Clause nor, *a fortiori,* the First Amendment. Hence, the Court DENIES Plaintiffs' motion for a preliminary injunction.

IT IS SO ORDERED

DATED: November 27, 2007

s/ A. Howard Matz
A. HOWARD MATZ
United States District Judge

APPENDIX C — RELEVANT STATUTES

San Clemente, California, Code of Ordinances
Title 8 - HEALTH AND SAFETY
Chapter 8.40 - LITTER

8.40.010 – Short title.

This chapter shall be known and may be cited as the "San Clemente Anti-Litter Ordinance."

(Prior code § 21A-1)

8.40.020 – Definitions.

For the purposes of this chapter, the following words and phrases shall have the meanings respectively ascribed to them by this section:

> "Litter" means garbage, refuse and rubbish as defined herein and all other waste material which, if thrown or deposited as herein prohibited, tends to create a danger to public health, safety and welfare.

8.40.130 – Same Placing on vehicles.

No person shall throw or deposit any commercial or noncommercial advertisement in or upon any vehicle. Provided, however, that it shall not be unlawful in any public place for a person to hand out or distribute, without charge to the receiver thereof, a noncommercial advertisement to any occupant of a vehicle who is willing to accept it.

(Prior code § 21A-13)

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No. 09-777

Supreme Court, U.S.
FILED
JAN 18 2010
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In The Supreme Court of the United States

CITY OF SAN CLEMENTE,

Petitioner,

v.

STEVE KLEIN; SUSEN FAY; M. LORRAINE KLEIN; MICHAEL LEWIS; SAUL LISAUSKAS; KRISTIN SCHUITEMAN; JEFFERSON SMITH; MARY THOMPSON; ELIZABETH WELLER; and ROBERT WELLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REASONS WHY THE COURT SHOULD DENY THIS PETITION

I. Any decision rendered by this Court regarding the federal question would merely be an advisory opinion, because the lower court also based its decision on independent state grounds not subject to this Court's jurisdiction

In addition to *First Amendment* violations, Klein also alleged violations of Article I, section 2(a) of the California Constitution. *Klein v. City of San Clemente*, 584 F.3d 1196, 1200 n.1 (9th Cir. 2009). The clause provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. 1, § 2(a). This clause is a protective provision more definitive and inclusive than the First Amendment. *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 908 (1979). *See also Kuba v. 1-A Agricultural Ass'n*, 387 F.3d 850, 856-57 (9th Cir. 2004).

In this case, the court expressly analyzed the California Constitution. *Klein*, 584 F.3d at 1205-07. While the court devoted three pages of its substantive analysis to the *First Amendment*, it also devoted two pages to the state law issue. *Id.*

This Court does not review decisions that rest on independent state grounds. *See Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983); *Herb v. Pitcairn*, 324 U.S.

117, 125-26 (1945). In this case, any decision rendered by the Court regarding a federal question would merely be an advisory opinion, because the vehicle leafleting ban would remain invalid under state law. *Cf. Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 136 (1946) (refusing to decide constitutional validity of a federal statute because of the presence of a dispositive non-constitutional issue).

II. Because the City seeks review of an interlocutory order, granting certiorari is unwarranted because no compelling need exists for resolution before trial

This case involves the interlocutory appeal of the district court's denial of a motion for a preliminary injunction. *Klein v. City of San Clemente*, 584 F.3d 1196, 1199 (9th Cir. 2009). The City seeks review of this interlocutory order, despite the fact that the parties have nearly completed discovery (with an impending discovery cut-off date of March 22, 2010) and despite the fact that a district court will hear the parties' cross-motions for summary judgment by May 3, 2010. (District Court Docket, Doc. 74, Scheduling and Case Management Order, Exhibit A) Under these circumstances, granting review of an interlocutory order makes no sense.

This Court has held that "except in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Thus, the lack of

finality in the judgment below may "of itself alone furnish[ ] sufficient ground for the denial of the application." *Id.*

Ordinarily, "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent *extraordinary* inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893) (emphasis added).

In this case, granting review would do the opposite – and halt a trial process that is scheduled for quick completion. Substantial progress toward a final decision greatly lessens the odds that a Supreme Court ruling will save the parties, and the courts, from wasted effort. Indeed, this Court has warned that review of a non-final order may induce inconvenience, litigation costs, and delay in determining ultimate justice. *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152-53 (1964). That is exactly the case here.

In fact, the court indicated that the City might be able to enact a valid ban on vehicle leafleting *provided* it could produce *evidence*, at trial, demonstrating that such activity really creates a litter problem in the City. *Klein v. City of San Clemente*, 584 F.3d 1196, 1203 (9th Cir. 2009). Hence, it is still possible that the City could prevail after further fact-finding, without this Court's intervention. This Court seldom grants review in cases that would benefit from

further factual development of the issues. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998).

III. The allegedly conflicting decisions are distinguishable on their facts

While the City claims that a circuit court conflict exists regarding this issue, the single case cited by it is easily distinguished. In that case, the court addressed a situation where a city ordinance prohibited persons from using vehicles as billboards by placing leaflets, signs, or posters on them, thereby creating visual blight. *Jobe v. City of Catlettsburg*, 409 F.3d 261, 263, 268, 270 (6th Cir. 2005).

In this case, however, the law involves *only* leaflets – and the court expressly held that visual blight from using vehicles as billboards was not at issue. *Klein*, 584 F.3d at 1201. Thus, the allegedly conflicting cases are easily reconcilable. Stated another way, *Jobe* is distinguishable from the three other vehicle leafleting cases, because it is more aptly classified as a billboard case, rather than a traditional leafleting case. *See id.* at 1201-02 (criticizing City's citation of billboard cases). In short, there is no conflict between the circuit courts. It is highly unlikely that another court will reach a different result in a vehicle leafleting case on the same set of facts.

The City argues that *Jobe* conflicts with other circuit court decisions regarding whether a city may use common sense as a substitute for evidence to

justify a speech restriction. (Petition, pages 6-9) In subsequent cases, however, the Sixth Circuit *itself* has backed away from this novel idea. The Sixth Circuit has clarified that *Jobe* was based *not* on common sense or mere speculation, but on the existence of some evidence. *Pagan v. Fruchey*, 492 F.3d 766, 777 n.9 (6th Cir. 2007) (citing the evidence relied upon by the court in *Jobe*).

In *Pagan*, the Sixth Circuit struck down a speech restriction because the City produced no evidence justifying the need for a ban on "for sale" signs on vehicles. *Id.* at 777-78. The court held that "principles of common sense or obviousness" are insufficient to uphold a speech restriction. *Id.* at 778. The Sixth Circuit followed this reasoning in subsequent cases. *E.g., Bellsouth Telecommunications, Inc. v. Farris*, 542 F.3d 499, 509 (6th Cir. 2008). Thus, to the degree that *Jobe* may be read to not require *any* evidence (contrary to the holdings of other circuit courts), subsequent Sixth Circuit decisions have thoroughly discredited this interpretation of the case.

IV. The constitutional issue is not fully developed enough for review

Even if a conflict did exist, this newly emerging legal issue is in a state of flux and would therefore benefit from further development through the lower courts. This is especially true in the context of constitutional adjudication, because this Court's rulings cannot be overturned by statutory amendment. An

ill-conceived constitutional ruling by a lower court may be tolerable, but a premature Supreme Court ruling that fails to appreciate, or properly weigh, all the relevant aspects of a constitutional issue could have a severe – and lasting – adverse impact on the nation.

The more important an issue, the more this Court will benefit from further consideration of the issue by the lower courts. By allowing an issue to fully develop, the Court can avail itself of the wisdom of many other jurists before reviewing an important constitutional matter. *See, e.g., McCray v. New York*, 461 U.S. 961, 963 (1983) (denying certiorari where legal issue required "further study" in the lower courts). Moreover, allowing further litigation often enables the circuit courts to build a consensus that resolves an issue without this Court's intervention.

Indeed, in two-of-three previous vehicle leafleting cases, parties petitioned for writ of certiorari (after summary judgment and an appeal), but this Court denied certiorari in both cases. *Jobe v. City of Catlettsburg*, 546 U.S. 876 (2005); *City of Fort Smith v. Krantz*, 527 U.S. 1037 (1999); *Cities of Alma, Dyer, and Van Buren v. Krantz*, 527 U.S. 1037 (1999). This is a strong indication that this issue is not yet ripe for review in this Court.

V. Only questions of evidence and factual findings are involved in this case

In this case, the City merely quibbles over factual determinations made by the court below. It attacks the lower court's finding that the City presented no evidence that vehicle leafleting caused a litter problem. (Petition, pages 6-9)

The court found that "the record in this case is plainly inadequate to support the government's asserted interest in restricting Klein's speech." *Klein v. City of San Clemente*, 584 F.3d 1196, 1202-03 (9th Cir. 2009). "In sum, the City has not provided any evidence that placing leaflets on parked cars results in any litter, much less a more-than-minimal amount of additional litter." *Klein*, 584 F.3d at 1204.

As noted earlier, the court indicated that the City might be able to enact a valid ban on vehicle leafleting *provided* it could produce *evidence*, at trial, demonstrating that such activity really creates a litter problem in the City. *Klein*, 584 F.3d at 1203. This Court does not grant review of "fact bound" cases. "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . ." Supreme Court Rule 10.

VI. The court below fully considered, and correctly decided, the issues

Ignoring well-established precedent of this Court, the City seeks to eliminate the rule that, before enacting a law that restricts speech, it must produce

evidence establishing that the targeted problem really exists. (Petition, pages 6-9) The City fails to realize that curbing speech without producing any evidence that a problem exists is anathema to our constitutional Republic.

When a law restricts speech, the government's burden to produce evidence is not satisfied by mere speculation or conjecture; it must offer evidence establishing that the problem it identifies is real and that the speech restriction will alleviate that problem to a material degree. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). For example, in a case where campaign-contribution-limits restricted speech, this Court held that "Congress must show *concrete evidence* that a particular type of financial transaction is corrupting or gives rise to the appearance of corruption. . . ." *McConnell v. FEC*, 540 U.S. 93, 185-86 n.72 (2003) (emphasis added).

In this case, the Ninth Circuit also relied on the reasoning of two other vehicle leafleting cases from the Seventh and Eighth Circuits. *Klein v. City of San Clemente*, 584 F.3d 1196, 1203-04 (9th Cir. 2009). A Seventh Circuit decision held that a City cannot rely on mere speculation when restricting speech: "common sense . . . can all-too-easily be used to mask unsupported conjecture, which is, of course, *verboten* in the *First Amendment* context." *Horina v. Granite City*, 538 F.3d 624, 633 (7th Cir. 2008) (emphasis in original). An Eighth Circuit decision held that the City failed to establish "a factual basis for concluding that a cause-and-effect relationship actually exists

between the placement of handbills on parked cars and litter that impacts the health, safety, or aesthetic well-being of the defendant cities." *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1221-22 (8th Cir. 1998). As a result, the court below fully considered, and correctly decided, this issue.

VII. There are several alternative bases for affirming the decision

There are other alternative bases for affirming the decision, including issues raised by Klein but not addressed by the Ninth Circuit. Klein raises those issues here to preserve them on appeal. Klein argued that speech on private property (i.e., vehicles) deserves *more* constitutional protection than the level provided on public streets and sidewalks. (General Docket, Doc. 9, Opening Brief, pages 9-10)

Klein argued that the law violates the constitutional right-to-receive-speech, especially when it occurs on one's own private property. (General Docket, Doc. 9, Opening Brief, pages 11-18) The right-to-receive-speech is well-established. *E.g., Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (holding that the First Amendment "embraces the right to distribute literature (citation omitted) and necessarily protects the right to receive it."). "This right to receive information and ideas, regardless of their social worth (citation omitted), is fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). While the City failed to discuss this issue in its

petition, it was central to the court's decision. *Klein v. City of San Clemente*, 584 F.3d 1196, 1204 (9th Cir. 2009).

Klein also argued that while litter prevention is a reasonable state interest, this Court has never held that litter prevention, *by itself*, is a significant state interest. (General Docket, Doc. 9, Opening Brief, pages 19-23) *E.g., Martin*, 319 U. S. at 143 ("The privilege [to distribute literature] may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets."); *Schneider v. New Jersey*, 308 U.S. 147, 162-63 (1939) (same). While the court noted that litter prevention is probably not a "sufficiently significant interest" to preclude vehicle leafleting, it sidestepped this dispositive issue because it concluded that "the record is insufficient to establish such an interest here." *Klein*, 584 F.3d at 1202 n.5.

Klein also argued that the law is not narrowly tailored because the City has numerous and obvious, less restrictive, alternatives available: (1) it could simply punish persons who receive leaflets and then choose to litter, (2) it could require activists to place leaflets securely on vehicles (e.g., under windshield wipers) so that vehicle leafleting could not create litter, or (3) it could allow drivers who do not want leaflets on their vehicle to place a sign on their dashboard. (General Docket, Doc. 9, Opening Brief, pages 23-27) Each option is far less restrictive on speech than a total ban on vehicle leafleting, thereby demonstrating that the law is not narrowly tailored.

Klein also argued that the law is facially overbroad, because it includes vehicle leafleting activities that do not cause litter. (General Docket, Doc. 9, Opening Brief, pages 34-35) First, it bans leafleting on vehicles owned by willing recipients (who will not litter). Second, it bans leafleting even when leaflets are securely placed on vehicles (e.g., under windshield wipers), where they cannot blow away and cause litter. This is another independently dispositive reason for affirming the decision.

CONCLUSION

For the reasons set forth above, the Court should deny the City's petition for writ of certiorari.

Respectfully submitted,

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